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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-319

TERESA NATALE MARSHALL and
JAMES LEE VERDON, Petitioners,

v.

CITY OF SEATTLE, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The petitioners, James Lee Verdon and Teresa Natale Marshall, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Washington.

OPINION BELOW

The opinion below is reported, officially, at 83 Wn.2d 665, and unofficially at 521 P.2d 693. A copy of the opinion is appended to this petition.

JURISDICTION

The opinion below was originally filed April 25, 1974. It became a final judgment on June 24, 1974, on which date the petition for rehearing was denied.

Jurisdiction of this Court is pursuant to 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. Is it constitutional under the First and Fourteenth Amendments for a state to apply a criminal ordinance prohibiting nudity in public to a performance on a stage in a theatre?

2. Does a finding by a state court that a burlesque strip-tease dance is obscene violate the First and Fourteenth Amendments?

3. Does it violate the due process clause of the Fourteenth Amendment for the Supreme Court of Washington to affirm the convictions of petitioners upon the basis of the conclusion by that Court that the subject performances were obscene when petitioners had never been charged with or tried for violating an obscenity law?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

City of Seattle Ordinance 16046, § 21, provides:

> "It is unlawful for any person to appear in a state of nudity, or

in any indecent or lewd dress, or make any indecent exposure of his person, or to expose his private parts to public view, or be guilty of any lewd act or behavior in any place exposed to public view."

The relevant portion of the First Amendment to the United States Constitution provides:

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

The relevant portion of the Fourteenth Amendment to the United States Constitution provides:

"[N]or shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

Petitioner Teresa Natale Marshall was charged by complaint filed in the Municipal Court of Seattle, Washington, the material portion of which reads as follows:

"That on or about the 7th day of December, 1971, at the City of Seattle, in King County, Washington, the said defendant did commit a misdemeanor--as follows, to-wit:

Then and there being the said Defendant did wilfully and unlawfully expose her private parts to public view at 512 2nd Avenue, all of which is contrary to Ordinance No. 16046, Section 21 . . ."

(R. Tr. Marshall, p. 5).

Petitioner James Verdon was charged by complaints with violating Ordinance 16046, § 21, on four occasions by "aiding and abetting" various designated dancers to expose their private parts to public view, on February 4, 11, 12 and March 9, 1972 (R. Tr. Verdon, p. 7).

Petitioners were found guilty in Municipal Court and appealed to the Superior Court for King County, Washington, for trial de novo. The cases were consolidated for trial. Trial was to the Court without a jury. The only witnesses who testified were the arresting officers.

Petitioner Verdon was the manager of the New Paris Theatre, a burlesque theatre, in Seattle. He had the responsibility of hiring and firing performers and counseled them on the type of performance they were to give (R. St. 10). Petitioner Marshall was one of the performers at the New Paris Theatre (R. St. 12, 13).

The critical facts were not disputed. Petitioner Marshall (and other performers) performed a "strip-tease" dance. She entered the stage alone, fully clothed, danced to the music, removing her clothing

during the dance, and ending up nude during the last few minutes of the performance (R. St. 12, 13). While nude, she opened her legs so her private parts were clearly visible to the audience, and she did a "bump and grind sex act" (R. St. 13).

The performances by the dancers that petitioner Verdon was charged with aiding and abetting were substantially similar (R. St. 3-11).

Signs outside the New Paris Theatre stated that the performers appeared nude, and a sign at the cashier's cage stated that no minors were allowed (R. St. 9, 10).

Petitioners presented no evidence. The fact that petitioner Marshall and other performers appeared nude was uncontradicted. The defense throughout was that (1) Ordinance 16046, § 21, did not, as a matter of construction, apply to what occurred on a stage in a theatre during a performance; (2) if the ordinance applied, then it was unconstitutionally overbroad on its face under the First and Fourteenth Amendments. (An additional ground was urged as to Verdon--that it was not a crime under the subject ordinance to aid and abet nudity of another; this ground is not included in this petition.)

This defense was argued to the Court

at the close of the evidence.[1] The trial co· s only ruling was:

> "THE COURT: I will find the defendant Marshall guilty and the defendant Verdon guilty on all counts.
>
> "The First Amendment does protect certain things but certainly under the evidence here this is not overbroad. The conduct was obviously obscene, no question about it, and it is not protected by the First Amendment."

Formal findings of fact and conclusions of law and judgment and sentence were entered, and petitioners appealed directly to the Washington State Supreme Court, the state's highest court.

The trial court's findings of fact made no reference to obscenity or any of the components thereof under the then extant *Roth-Memoirs* test, or the *Miller* test. The Court did enter a conclusion of law in each case that the subject performances were "lewd and obscene." (R.

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[1] Argument of counsel is not included in the record below (R. St. 13). However, it is apparent from the trial court's brief oral ruling, set out below, that overbreadth of the ordinance was urged at the trial court level.

Tr. Verdon, p. 4-6; R. Tr. Marshall, p. 2-5; conclusion of law III in Marshall reads, "That at the described time and place the defendant's acts upon the stage were lewd and obscene;" conclusion of law II in Verdon reads, "That the above described actions defendant counseled the above described women to perform were conduct and not constitutionally protected speech, and said actions were lewd and obscene.")

On appeal to the state Supreme Court petitioners assigned error to the above quoted conclusions of law, as well as the adjudication of guilt. Because the opinion of the Washington Supreme Court did not directly state that it decided that the ordinance was not unconstitutionally overbroad construed as applicable to the stage, excerpts from petitioners' brief on appeal to the Washington Supreme Court which demonstrate that this question was properly raised in that Court are set out in the appendix. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Street v. New York*, 394 U.S. 576 (1969).

The opinion of the Washington Supreme Court is appended hereto. That Court held that the subject ordinance was applicable to performances on the stage in a theatre.

That Court did not, however, go on to directly answer the federal constitutional question raised as to whether the ordinance, as thus construed, was unconstitutional on its face. Nor did that Court hold that petitioners lacked standing to assert the

overbroadness of the ordinance as applied to others. The Court held that the performances were obscene. It postured petitioners' contention as:

> "The arguments of the defendants that their performances are protected by First Amendment rights need not be considered if it is determined that they were obscene. Obscenity is not protected by the First Amendment."

and

> "The defendants argue extensively, however, that a theatrical performance is protected by the First Amendment as it is in [sic] verbal communication."

The Court answered this point by saying that the argument might be valid as to some performances, but it wasn't as to these because they were obscene.

That Court went on to say that petitioners had argued that the ordinance was "not sufficiently broad to encompass obscenity" and held that this argument was without merit. Petitioners had not, of course, argued that the ordinance wasn't broad enough. Petitioners had, rather, contended that it was overbroad.

Petitioners filed a timely petition for rehearing, contending, *inter alia*, that: (1) the affirmance by the Supreme

Court of Washington based upon that Court's conclusion that the performances were obscene denied due process of law; (2) again arguing that the holding that Ordinance 16046, § 21, applied to performances on a stage in a theatre rendered the ordinance unconstitutionally overbroad on its face under the First and Fourteenth Amendments; (3) the conclusion by the Washington Supreme Court that the performances were obscene was contrary to the First and Fourteenth Amendments; and (4) the apparent construction by that Court of Ordinance 16046, § 21, as incorporating "obscenity" and application of that unforseeable construction to this case was a denial of due process of law.

The federal constitutional question of whether the performances were not obscene and, therefore, protected by the First and Fourteenth Amendments was raised in the Court below both by assignment of error to the conclusions of law of the trial court that the performances were lewd and obscene, and by petition for rehearing after the Court's decision attacking the decision that the performances were obscene and not protected by the First Amendment. This federal constitutional question was clearly passed on in the opinion of the Court below.

The federal constitutional question of whether the Court's affirming the convictions based on the Court's conclusion that the performances were obscene, hence affirming the convictions under a law with a vastly different meaning, was a denial of due process of law was directly raised by way of petition for rehearing.

The federal constitutional question of unconstitutional overbreadth of the ordinance construed as applicable to stage performances was directly raised in the trial court and in the brief on appeal and was properly before that Court. The Court did not directly answer that question, but this Court nonetheless has jurisdiction to review it. *Chambers v. Mississippi,* 410 U.S. 284 (1973). Implicit in the decision of the Washington Court is that it held either: (1) that the ordinance, as so applied, is not unconstitutionally overbroad; or (2) that petitioners had no standing to assert its overbreadth because the subject performances were obscene. Either view is contrary to established constitutional decisions of this Court.

Notably, the Court below held that the ordinance was "sufficiently broad to encompass obscenity." It clearly did not *limit* the breadth of the ordinance to obscenity.

ARGUMENT FOR ALLOWANCE OF WRIT

I

COMMENT

Throughout the trial and on appeal to the Washington Supreme Court, petitioners' contentions were simple and direct--that Ordinance 16046, § 21, did not, as a matter of construction, apply to theatrical performances, and, if it did, it was unconstitutionally overbroad under the First and Fourteenth Amendments. The obscenity

vel non of the performances was not an issue The petitioners were not charged with violating an obscenity ordinance, nor did the complaints allege that the performances were obscene.

The basis of the affirmance below is not at all clear in one very important respect. That is whether the Court upheld the convictions because the performers violated the ordinance, as written and as charged in the complaint, by appearing nude and thereby exposing their private parts to view, or whether that Court upheld the convictions because of that Court's conclusion that the performances were obscene and that Court's conclusion that the ordinance prohibited obscenity. Under either view of the Court's opinion, established federal constitutional principles were violated. However, we believe this requires analysis of the opinion under either alternative view.

II

THE QUESTION OF WHETHER A LAW PROHIBITING PUBLIC NUDITY CAN CONSTITUTIONALLY BE APPLIED TO PERFORMANCES ON THE THEATRICAL STAGE PRESENTS A FEDERAL CONSTITUTIONAL QUESTION OF SUBSTANCE NOT PREVIOUSLY DETERMINED BY THIS COURT, AND UPHOLDING THE CONSTITUTIONALITY OF SUCH AN APPLICATION OF SUCH A LAW IS PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

Ordinance 16046, § 21, is a rather sweeping ordinance, prohibiting indecent

exposure, public indecency, public nudity and lewdness. Similar laws are to be found on the books in most cities and states.

This Court has not heretofore had occasion to pass upon the constitutionality of applying such a law to conduct occurring during a performance on a stage in a theatre. It is common knowledge that nudity during a stage performance is becoming more commonplace throughout the country. Mr. Justice Finley in his dissent below cites several examples, including the well-known production of "Hair" and "Oh Calcutta." The question of the constitutionality under the First Amendment of applying laws governing public behavior generally to what occurs on the stage is of great significance. Limiting what an actor may do on the stage to what he may do on the street would have a significant chilling effect upon the theatre.

Nor has this Court squarely determined the question of whether the stage is a communication medium protected by the First Amendment. However, this Court strongly intimated in *Miller v. California*, 413 U.S. 15, 26 (Note 8); and see *Schacht v. United States*, 398 U.S. 58 (1970), that performances on the stage were within the ambit of the First Amendment guarantee of free speech and press. This Court in *California v. LaRue*, 409 U.S. 109, at 116, 117, stated that:

"Our prior cases have held that both motion pictures and theatrical

productions are within the protection of the First and Fourteenth Amendments."

However, in Both *Miller* and *LaRue* this Court stated that the state's power to regulate non-verbal conduct on the stage was greater than that of regulation of description or depictions on the printed page or the screen of the same conduct, citing *United States v. O'Brien*, 391 U.S. 367 (1968).

Notably, however, the incidental restrictions upon First Amendment freedoms authorized by *O'Brien* are dependent upon a significant state interest being served by the non-speech aspects of the regulation. It is difficult to conceive of any different state interest being served by regulation of live conduct on a stage in a theatre with the audience limited to forewarned, consenting adults than is served by regulation of the content of a motion picture exhibited in the same theatre. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

The effect of this Court's remarks concerning live non-verbal conduct and the stage is that at least the extent of First Amendment protection to the stage in a theatre is vague. This case directly presents the question of whether the stage is a medium of communication protected by the First Amendment. It also directly presents the question of application of *O'Brien* analysis, as it involves

non-verbal conduct which, when occurring off-stage and in public, is rather clearly a proper subject of state prohibition.

Petitioners contend that Ordinance 16046, § 21, if applied to the stage, is unconstitutionally overbroad. Petitioners contend that the stage is a medium of communication potentially entitled to First Amendment protection. *California v. LaRue*, 409 U.S. 109 (1972). The subject ordinance is an across-the-board ban on nudity. It seems well settled, by applicable decisions of this Court, that nudity alone is not obscene, and in the context of a medium protected by the First Amendment cannot constitutionally be prohibited. *Jenkins v. Georgia*, ___ U.S. ___ (1974); *California v. LaRue*, 409 U.S. 109 (1972); *Sunshine Book Company v. Summerfield*, 355 U.S. 372 (1958), reversing per curiam 101 U.S. App. D.C. 358, 249 P.2d 114 (1957).

Construed as applicable to the stage, the language of this ordinance

> "permit[s] within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech [and, therefore] is void, on its face, as contrary to the Fourteenth Amendment."

Winters v. New York, 333 U.S. 507 (1947).

Construed as applicable to the stage, the ordinance is

"unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

Coates v. Cincinnati, 402 U.S. 611 (1971).

Construed as applicable to the stage, the ordinance becomes, to that extent, a regulation of speech. As such, precision of regulation must be the touchstone. *Interstate Circuit v. Dallas*, 290 U.S. 676 (1968); *NAACP v. Button*, 371 U.S. 415 (1963).

Petitioners have standing to assert the unconstitutionality of the ordinance even if their performances were obscene and, therefore, subject to prohibition under a constitutionally-proper obscenity ordinance, and in that vein the petitioners have standing to assert its unconstitutionality as to others, such as "Hair" and "Oh Calcutta." *Gooding v. Wilson*, 405 U.S. 51 (1972); *NAACP v. Button*, 371 U.S. 415 (1963).

Petitioners submit that this question presents a substantial federal constitutional question not previously decided by this Court and which was decided by the Court below probably not in accord with applicable decisions of this Court, and is a question which this Court should revi because of its nationwide significance.

III

THE QUESTION OF WHETHER A STRIP-TEASE BURLESQUE PERFORMANCE PERFORMED IN A THEATRE TO AN AUDIENCE OF PRE-WARNED ADULTS CAN CONSTITUTIONALLY BE FOUND OBSCENE AND UNPROTECTED BY THE FIRST AMENDMENT PRESENTS A FEDERAL QUESTION OF SUBSTANCE NOT PREVIOUSLY DETERMINED BY THIS COURT, AND THE DECISION OF THE WASHINGTON COURT THAT SUCH A PERFORMANCE IS OBSCENE IS PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The Court below held that the performance of petitioner Marshall was

> "obscene on its face. It is obscenity per se.
>
> ". . .
>
> ". . . [And] that reasonable men could not differ that the elements essential to constitute obscenity [the *Miller* elements] existed in the conduct of the performers in this case, and that no opinion evidence is necessary to support such a conclusion.
>
> "[Because] '[h]ard core pornography' can and does speak for itself on the question of obscenity . . ."

This Court has not heretofore passed upon the question of whether *any* live

performance is obscene, As above pointed out, this Court has, however, at least intimated that a state can prohibit certain undefined things done in a live performance which it could not prohibit the description or portrayal of, verbally or pictorally, *United States v. O'Brien*, 391 U.S. 367 (1968); *Miller v. California*, 413 U.S. 15 (1973); *California v. LaRue*, 409 U.S. 109 (1972).

In commenting upon the regulations involved in *California v. LaRue, supra*, which regulations prohibited certain sexual activity[2] as well as

> "[t]he actual or simulated 'displaying of the pubic hair, anus, vulva or genitals';"

this Court stated that it did

> "not disagree with the District Court's determination that these regulations on their face would proscribe some

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[2] In *California v. LaRue, supra*, this Court had before it regulations which prohibited:

"(a) The performance of acts, or simulated acts, or 'sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law';

"(b) The actual or simulated 'touching, caressing or fondling on the breasts,

forms of visual presentation that would not be found obscene under Roth and subsequent decisions of this Court."

409 U.S. at 116.

This Court also stated that:

"While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression . . ."

409 U.S. at 118.

This Court cited *Sunshine Book Co. v. Summerfield,* 355 U.S. 372 (1958), a case dealing with depictions of nudity, at least thereby implying that the portion of the regulations relating to nudity "display of the pubic hair, anus, vulva or genitals") would be unconstitutional under

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buttocks, anus or genitals';

"(c) The actual or simulated 'displaying of the pubic hair, anus, vulva or genitals';

"(d) The permitting by a licensee of 'any person to remain in or upon the licensed premises who exposed to public view any portion of his or her genitals or anus'; and, by a companion section,

"(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above. Rules 143.3 and 143.4"

the First Amendment in a setting potentially meriting First Amendment protection.

Then in *Miller v. California*, 413 U.S. 15 (1973), this Court held that state regulation of obscenity had to be limited to "sexual conduct," 413 U.S. at 24. This term seems to imply that some sexual activity was necessary and would exclude depictions, portrayals (or performances) of or by one person, alone, unless that person was doing something sexually active, such as fondling him or herself or masturbating. However, this Court went on to include within the "plain examples of what a state statute could define for regulation . . ."

> "[p]atently offensive . . . exhibition of the genitals."

413 U.S. at 26.

It is most difficult to rationally differentiate between a display of the genitals and a lewd display of the genitals.

The apparent inconsistencies and at least ambiguities raised by the previous comments of this Court respecting what may or may not be found obscene when performed on the stage makes granting of review in this case doubly appropriate. Not only is that a substantial federal constitutional question which this Court has not heretofore directly passed upon, but it is also

an issue upon which this Court has heretofore commented upon in seemingly inconsistent fashion.

If, as this Court has intimated, the federal constitutional guidelines for determination of the obscenity vel non of non-verbal conduct in the theatre are different than those for the printed pictures or words (the *Miller* test), what, then, are th.. ?

The burlesque strip-tease is an old, established form of theatre in this country. Whether stripping to total nudity, which is strip-tease in its present form, can constitutionally be prohibited by the states is a significant question. It certainly doesn't involve "sexual conduct" in any commonly understood sense of that term. It is certainly far removed from the sc.. of "hard core pornography" this Court seemed concerned with in *Miller*. It is, likewise, far removed from the sort of overt sexual conduct described in *LaRue*.

Review of this question should be granted.

IV

THE AFFIRMANCE OF PETITIONERS' CONVICTIONS BY THE COURT BELOW BASED UPON THAT COURT'S CONCLUSION THAT THE PERFORMANCES WERE OBSCENE WHEN PETITIONERS HAD NOT BEEN CHARGED WITH NOR TRIED FOR OBSCENITY DENIED DUE PROCESS OF LAW UNDER APPLICABLE DECISIONS OF THIS COURT.

One of the alternative apparent bases for the affirmances of the convictions by the Court below was that Court's conclusion that the performances were obscene under the *Miller* test of obscenity.

Petitioners were charged with violating Ordinance 16046, § 21, by (in the case of Marshall) exposing her "private parts to public view," and (in the case of Verdon) by "aiding and abetting" others who exposed their private parts to public view.

Ordinance 16046, § 21, is not an obscenity law. The word "obscene" is not to be found therein. It is not apparently a regulation of performances, movies, books, etc., which are typically regulated by an obscenity ordinance. The ordinance contains none of the key phrases one would expect in an obscenity law, such as "community standards," "patently offensive," "serious value" or "redeeming social value."

Compare Ordinance 48022, § 26, of the ordinances of the City of Seattle, a part of that city's licensing ordinance:

> "No amusement, entertainment or exhibition of a vulgar or obscene character shall be permitted."

Further compare RCW 9.68.010, the Washington State obscenity statute, which makes it a crime, with "knowledge of the contents thereof," to

"cause to be performed or exhibited, or [to] engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene."

The word "obscene" is "not merely a generic or descriptive term, but a legal term of art." *Hamling v. United States*, ___ U.S. ___ (1974). This Court held in *Hamling* that use of the word "obscene" in an indictment gives a defendant adequate notice of the charge against him and need not allege the factual components of obscenity.

In this case we have the antithesis. There is no mention of the magic word "obscene" in either the criminal complaint nor the ordinance petitioners were charged with violating.

Under the view of the opinion below we are here concerned with the Supreme Court affirmed the convictions because they found the petitioners guilty of obscenity under the *Miller* test. Affirmance of the convictions because of a conclusion by the appellate court that petitioners were guilty of some crime other than the one they were charged with denies due process under the applicable decisions of this Court.

This Court has repeatedly held that it is a denial of due process to convict a person on a charge not made. *Rabe v. Washington*, 405 U.S. 313 (1972); *Gregory*

v. Chicago, 394 U.S. 111 (1969); *Garner v. Louisiana*, 368 U.S. 517 (1961); *Thornhill v Alabama*, 310 U.S. 88 (1939).

The very essence of due process in a criminal case is the right to reasonable notice of the charge and fair opportunity to defend against that charge. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *In re Oliver*, 333 U.S. 257 (1948).

These petitioners had no notice that they were charged with giving or aiding and abetting obscene performances, and they had never had an opportunity to defend against those charges.

The affirmance by the Supreme Court of Washington of these convictions based upon that Court's conclusion that petitioners were guilty of an ordinance other than the ordinance they were charged with violating is not in accord with applicable decisions of this Court regarding due process of law, and this case should be reviewed.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

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Seattle, Washington 98104

Counsel for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

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APPENDIX

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[Nos. 42650, 42651. En Banc. April 25, 1974.]

THE CITY OF SEATTLE, *Respondent*, v. TERESA NATALE MARSHALL *et al.*, *Appellants*.

[1] **Obscenity—Determination—Test.** Conduct is determined to be obscene when it depicts or exhibits, in a patently offensive way, sexual conduct specifically defined by statute which, taken as a whole, lacks serious literary, artistic, political, or scientific value and appeals to the prurient interest of the average person upon application of contemporary community standards.

[2] **Obscenity—Determination—Obscenity Per Se—Expert Testimony.** When reasonable men could only conclude that specified conduct incorporates the essential elements of obscenity and only communicates a prurient sexual interest to its observers, such conduct is obscene per se. There is no requirement that such a conclusion be supported by any expert testimony.

[3] **Criminal Law—Indecent Exposure—Public View—Obscene Conduct.** Obscene conduct openly and overtly done in any place available to the public may constitute indecent exposure of a person to public view.

[4] **Obscenity—Determination—Effect.** Conduct determined to be obscene is not entitled to any First Amendment protection.

[5] **Criminal Law—Aiding and Abetting—Municipal Ordinance.** A person who directs and controls another's violation of a municipal ordinance thereby acquires the status of an aider and abettor and may be punished, under the terms of RCW 9.01.030, as a principal.

[6] **Obscenity—Determination—Lewd.** Lewd behavior is synonymous with obscene conduct.

FINLEY, WRIGHT, and UTTER, JJ., dissent by separate opinion.

Consolidated appeals from judgments of the Superior Court for King County, Nos. 59239, 61745, James W. Mifflin, J., entered December 11, 1972. *Affirmed.*

Prosecutions for indecent exposure and for aiding and abetting. The defendants appeal from convictions and sentences.

Victor V. Hoff, for appellants.

A. L. Newbould, Corporation Counsel, and *Helen Wilson, Assistant*, for respondent.

HUNTER, J.—This is a consolidation of appeals from two

separate convictions: (1) the appeal of Teresa Natale Marshall for conviction of directly participating in the asserted violation of Seattle Code 12.11.220; and (2) the appeal of James Lee Verdon for the conviction of aiding and abetting Teresa Natale Marshall and others in the asserted violation of the ordinance.

The appellants (defendants) were charged with violating the following ordinance:

> 12.11.220 Indecent exposure. It is unlawful for any person to appear in a state of nudity, or in any indecent or *lewd* dress, or make any indecent exposure of his person, or to expose his private parts to public view, or be guilty *of any lewd act or behavior in any place exposed to public view.* (Ord. 16046 § 21; May 23, 1907).

(Italics ours.)

The facts which are undisputed are as follows. On December 7, 1971, the defendant, Teresa Natale Marshall, while on the stage of the New Paris Theater, removed all of her clothing and while she was naked, spread her legs toward an all male adult audience and exposed her private parts to that audience. In addition, she laid on her back and then on her stomach and simulated a "bump and grind" sex act. On February 4, 11 and 12, 1972, and March 9, 1972, women on the stage of the New Paris Theater stripped until they were naked and while naked, simulated a sex act either on the stage or on a large padded stool that was on the stage, somersaulted and landed with their legs spread toward the audience, and exposed their private parts to an all male adult audience while sitting on the edge of the stage.

During the above times the defendant, James Lee Verdon, was the manager of the theater and was responsible for hiring and firing the above mentioned women, counseled them about their performance, and was responsible for deciding whether they would remove their G-strings during the performance. The New Paris Theater in Seattle admits the general adult public to any of its performances upon payment of a monetary fee.

[1] The threshold question in this case is whether the above conduct on the stage of the New Paris Theater was obscene. The United States Supreme Court, in *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973), defines obscenity as follows on page 24-25:

> [C]onduct . . . [or] works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, [408 U.S. 229 (1972)] at 230, quoting *Roth v. United States, supra*, [354 U.S. 476 (1957)] at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "*utterly* without redeeming social value" test of *Memoirs v. Massachusetts*, 383 U.S., at 419; . . .

[2] One needs no expert testimony for it to be concluded that this conduct that took place in the New Paris Theater comes squarely within the above definition, particularly when applying the basic guidelines enunciated. There was no plot to this base conduct; there was no communication of ideas other than a prurient sex interest. It was a pure exhibition to portray an interest in sex conduct in an offensive way without any semblance of literary, artistic, political or scientific value. The conduct was obscene on its face. It is obscenity per se. In *Morris v. United States*, 259 A.2d 337, 341 (D.C. App. 1969), that court quoted the following language from the Court of Special Appeals of Maryland, defining obscenity per se: (At that time the element of no redeeming social value, and the requirement of national community standards in the *Roth* and *Memoirs* definition were in effect. *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957), and *A Book*

Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966).)

> There is no desire to portray [it] in pseudo-scientific or "arty" terms. It can be recognized by the insult it offers, invariably, to sex and to the human spirit. It goes substantially beyond customary limits of candor and deviates from society's standards of decency in the representation of the matters in which it deals. It has a patent absence of any redeeming social value; it speaks for itself and screams for all to hear that it is obscene. It is not designed to be a truthful description of the basic realities of life as the individual experiences them but its main purpose [is] to stimulate erotic response. * * * No proof, other than the viewing of it, is required to determine if it is, in fact, obscene.

(Footnotes omitted.)

That court then said on page 341:

> It is clear to this court that where obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is pornographic or obscene or that it is below the national community standards. . . . In other words, if reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government on its case-in-chief need not offer any evidence of National community standards.

(Citations omitted.)

We hold that the conduct on the stage of the New Paris Theater on the occasion heretofore outlined was obscene per se; that reasonable men could not differ that the elements essential to constitute obscenity existed in the conduct of the performers in this case, and that no opinion evidence is necessary to support such a conclusion. In *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 623, 512 P.2d 1049 (1973), we stated:

> "[H]ard core pornography" can and does speak for itself on the question of obscenity, according to *Paris Adult*

> *Theatre I v. Slaton, supra;* [413 U.S. 49, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973)] . . . No amount of testimony by anthropologists, sociologists, psychiatrists, or psychologists could have added anything to the trial court's ability to determine that the materials failed to comply with any contemporary community standards related to sexual matters.

(Citations omitted.) The facts in this case do not constitute obscenity in the same degree as in *State v. J-R Distribs., Inc., supra,* but the rule therein stated should nevertheless be applicable.

That the performance in the New Paris Theater was obscene is further supported by the case of *Adams Theatre Co. v. Keenan,* 12 N.J. 267, 275, 96 A.2d 519 (1953), wherein Justice Brennan described a class of burlesque to be *obscene,* which clearly encompasses the facts of the instant case:

> In contrast, that which has been termed "modern burlesque" has been described as
> "*a plotless musical entertainment consisting of a series of unrelated episodes and dances, all with the purpose of depicting or suggesting sexual subjects or objects.* The one outstanding characteristic of modern burlesque is the fact that it is completely sex-centered. It has some low comedy and occasionally some humor, but the principal subject of both is sex. * * * The *piece de resistance* is the girl who disrobes, partially or entirely, and this act varies with the political season and the locality. * * * If burlesque of today is metropolitan, so also it is vice, and needs to be thought of in that light, as an aspect of social pathology. If vice implies a sense of antagonism toward existing mores, a purveying of sex in a vicarious, professional and promiscuous fashion, then burlesque is just that. * * * Although the operator may not be willing to say so to an inquirer, usually adopting a sanctimonious air, he knows, and everything in his theatre indicates he knows, that he is giving a sex show, sans excuses, sans philosophy and above all, sans clothes. He is, in that sense a professional purveyor of sex." *Dressler, Burlesque as a Cultural Phenomenon* (1937).

A burlesque show answering the latter description may well be considered outrightly lewd and indecent.

(Italics ours.)

[3] It is contended that the Seattle ordinance is a public view ordinance that relates to public view of conduct in the streets, and that a theater is not a place intended to be covered by the ordinance. We disagree. There is no language in the ordinance to support this limitation of its application.

It is further contended that the Seattle ordinance has not been violated on the theory that the performance in the New Paris Theater was not a public place and thus the proscribed conduct was not exposed to public view. This was answered emphatically in the negative by the United States Supreme Court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973), involving a case of consenting adults with paid admissions. The court stated on page 68:

> Finally, petitioners argue that conduct which directly involves "consenting adults" only has, for that sole reason, a special claim to constitutional protection. Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take. *Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment.* The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." *The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material,* has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society."

(Footnotes omitted. Italics ours.)

Our own Court of Appeals held a sauna parlor, which is less public than a theater, to be a public place. In *State v. Jones*, 9 Wn. App. 1, 8, 511 P.2d 74 (1973), that court stated:

> In any event, her conduct *was* open and overt because the Rama Royale Sauna was open to the public. Anyone could enter and ask for any of the massages offered. Merely because the appellant's actions took place behind a closed door in a business establishment open to the public does not make those acts any less public. They were only more difficult to observe.

We adopt this reasoning.

The cases cited in support of the contention that the New Paris Theater was not a public place, are oriented to the peculiar language of the ordinance or statute, or to the proposition that live theatrical performances are protected by the First Amendment, and are more distant from the audience than are performances in the cases of cabarets.

[4] The arguments of the defendants that their performances are protected by First Amendment rights need not be considered if it is determined that they were obscene. Obscenity is not protected by the First Amendment. *Roth v. United States, supra,* and reaffirmed in *Miller v. California, supra. See also State v. J-R Distribs., Inc., supra.*

The defendants argue extensively, however, that a theatrical performance is protected by the First Amendment as it is in verbal communication. This may be true in the context of a performance communicating a purpose, philosophy or idea (as long as it is not obscene), but there is no possible analogy of a theatrical performance to the conduct that occurred on the stage of the New Paris Theater that was devoid of any plot, and had no purpose whatsoever than to appeal to a sex-oriented prurient interest of an adult male audience.

[5] It is contended that there is no Seattle ordinance defining the crime of aiding and abetting, and hence the case must be dismissed against the defendants on that ground. This contention cannot apply to the defendant,

Teresa Natale Marshall, since she was a direct participant and was not charged with aiding and abetting. As to the defendant, James Lee Verdon, the definition of aiding and abetting in the state statutes is sufficient to justify the charge against him. The state statute, RCW 9.01.030, defines aiding and abetting as a status and it must therefore apply to all cities and municipalities where a defendant has actively and knowingly participated in the obscene conduct by his direction and control of the entire performance. Moreover, Seattle Code 12.11.010 states: "The word 'person' wherever used in this chapter . . . means and includes natural persons . . . whether acting by themselves or . . . agent or employee . . ." This ordinance clearly encompasses the defendant Verdon by his management, direction and control, and employment of those directly participating in the obscene conduct.

[6] It is further argued that the ordinance is not sufficiently broad to encompass obscenity. This argument is without merit. The ordinance sets forth acts of prohibited conduct. These acts are specifically enumerated in the ordinance—"state of nudity," "indecent or *lewd* dress," "indecent exposure of his person," "to expose his private parts to public view," "*any lewd act or behavior in any place exposed to public view.*" (Italics ours.) These specifics must be considered in context with the purpose of the ordinance, and that "lewd" is a word interchangeable in use with "obscene." *Webster's Third New International Dictionary* (1961) defines "lewd" as ". . . dissolute, lascivious . . . indecent, *obscene,* salacious . . ." (Italics ours.)

The judgment of the trial court is affirmed.

HALE, C.J., and ROSELLINI, HAMILTON, STAFFORD, and BRACHTENBACH, JJ., concur.

FINLEY, J. (dissenting)—For the reasons stated hereinafter, I cannot in good conscience agree with the majority opinion.

I would be the first to concede that the performance

engaged in by appellant Marshall would, in all probability, offend the sensitivities of a majority of Seattle's citizenry. However, it is not a proper exercise of this court's authority to stretch the meaning and intendment of an inapplicable ordinance to reach behavior which citizens, or for that matter members of the court, privately or personally may feel should be proscribed. It may well be that the indicated reprehensible societal behavior should be circumscribed, but that is the role of the legislative branch of local or state government.

At the outset, to place this case in proper perspective, it should be established what this case is and what it is not. First, the case involves a charge of indecent exposure brought under a Seattle city ordinance. Second, the defendants are *not* charged with the violation of an obscenity ordinance, *cf. Seattle v. Hinkley*, 83 Wn.2d 205, 517 P.2d 592 (1973), nor are they alleged to have violated the applicable state obscenity statute, RCW 9.68.010. The majority opinion notwithstanding, the only problem involved in this case is the interpretation of the indecent exposure ordinance as it applies to appellants, and no amount of emotionalism can change the facts and the relevant legal issues.

The Seattle city ordinance which appellants are alleged to have violated provides as follows:

> 12.11.220 Indecent exposure. It is unlawful for any person to appear in a state of nudity, or in any indecent or lewd dress, or make any indecent exposure of his person, or to expose his private parts to public view, or be guilty of any lewd act or behavior in any place exposed to public view. (Ord. 16046 § 21; May 23, 1907).

The ordinance renders criminal the exposure of "private parts to public view." To determine the applicability of this ordinance, it must first be determined what constitutes "public view." An identical question of interpretation was presented to the Supreme Court of California in *Barrows v. Municipal Court*, 1 Cal. 3d 821, 464 P.2d 483, 83 Cal. Rptr. 819 (1970). In that case, several members of the cast of a play which involved the graphic simulation of oral inter-

course were charged with violation of a statute which prohibited "lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view." *Barrows v. Municipal Court, supra* at 823 n.1. The California court held that the statute before it had no application to theatrical performances, *i.e.*, performances in a commercial theater. *Cf. Crownover v. Musick*, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973). Likewise, a New York court concluded that a statute forbidding "indecent exposure" did not apply to performances in a theater. *People v. Conrad*, 70 Misc. 2d 408, 334 N.Y.S.2d 180 (Buffalo City Ct. 1972). In a similar decision, the Michigan Court of Appeals held a Detroit "indecent exposure" ordinance inapplicable to "topless go-go dancing." *Jads, Inc. v. Detroit*, 41 Mich. App. 693, 200 N.W.2d 715 (1972).

Does the term "public view" appertain to the exposure of private parts behind the closed doors of the New Paris Theater? I think not. The Seattle ordinance, enacted in 1907, apparently was drafted to protect the public from being affronted in the public parks, on public thoroughfares, and in other unquestionably public places by those who exposed themselves to public view. Thus, the conduct engaged in by appellant Marshall would clearly have been proscribed by the ordinance had it occurred upon the public streets, or if it could have been viewed from a public thoroughfare. The consenting adults who had willingly paid for the privilege of watching the performance here involved are not the class of unsuspecting citizens the ordinance was designed to protect.

The majority attempts to finesse the ordinance's explicit requirement of a "public view" of any exposure of private parts or lewd act by stating that the theater was a public place.[1] Of course, it is! But, that, in itself, does not render

[1]The majority bulwarks its "public place" assertion with the case of *State v. Jones*, 9 Wn. App. 1, 511 P.2d 74 (1973), which involved the application of the state vagrancy statute, RCW 9.87.010(7) to activities within the confines of a massage parlor. In that case, there was no

the subject performance exposed to public view—it still may not be viewed from the public domain.[2]

If we are to take the majority at its word, it would be entirely proper for a citizen of Seattle or the police to file a valid complaint against any theatrical performance which offended their personal sense of morality.[3]

In conclusion, this court unanimously recently reiterated the cardinal principal of statutory construction that criminal sanctions must be narrowly construed in a manner most favorable to the defendant, *State v. Bell*, 83 Wn.2d 383, 518 P.2d 696 (1974). It is apparent, therefore, that the activities engaged in by appellants did not violate Seattle Code

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requirement that the offending conduct take place in a public place, and the Court of Appeals refused to impose one. I agree with its characterization in dictum that a massage parlor is a public place, but I cannot understand what the *Jones* case has to do with an ordinance which requires "public view" of the offending behavior.

[2]To stretch the majority's rationale one more step, it could be hypothesized that since members of the public pay to enter the theater, the presence of these admittees would render the performances subject to the requisite "public view." However, this stretches logic too far. Upon paying admission to the New Paris Theater, the admittee becomes, in the eyes of the law, an invitee and is, *ex hypothesi*, no longer a member of the general public.

[3]Theatrical performances which may fall in the minds of some within this class include: *Ballets*: the renowned performance of Ted Shawn in "Adonis" (performed in 1932); the Royal Danish Ballet in "The Triumph of Death"; and renditions of Nikolais' "The Relay" (performed for viewing on the BBC and New York's WNET/13), Harkarvy's "Squares", Smuin's "The Eternal Idol", Lichine's "Cain and Abel", the Netherlands Dance Theater in "Mutations", and the "Bach Suite". *Operas*: the performances of sopranos Arlene Saunders in Ginastera's "Beatrix Cenci" (performed at Kennedy Center) and Grace Bumbry in "Salome"; and production of Prokofiev's "The Fiery Angel". *Plays*: Zero Mostel's performance in "Ulysses in Nighttown" and that of Sarah Stephenson as Desdemona in "Othello"; the Broadway play of "Grin and Bear It"; and the off-Broadway plays of "Hair", "Oh Calcutta", and "Dark of the Moon".

12.11.220.[4] I am convinced that the judgment of the superior court should be reversed.

WRIGHT and UTTER, JJ., concur with FINLEY, J.

[No. 42995. En Banc. April 25, 1974.]

THE STATE OF WASHINGTON, *on the Relation of Carl E. Brundage, Respondent,* v. DONALD A. EIDE, *as Judge et al., Appellants,* THE CITY OF AUBURN, *Respondent.*

[1] **Criminal Law—Right to Counsel—Indigency—Determination.** A court is not required to find an accused to be utterly destitute or insolvent before determining him to be indigent and appointing counsel to assist him in his defense. Such a condition is relative and is determined on a case-by-case basis considering the need or service to be met. An accused is indigent for purposes of employing his own counsel when, considering the seriousness of the charge, prevailing legal fees, his resources and debts, past history, credit standing, earning capacity, family needs, and other applicable circumstances bearing on his ability to employ competent counsel, the court concludes that he is financially unable to obtain counsel.

[2] **Criminal Law—Right to Counsel—Indigency—Impairment of Right—Repayment.** An indigent accused's exercise of his constitutional right to counsel without cost may not be unnecessarily deterred or burdened by imposition of post-proceedings reimbursement obligations.

[3] **Criminal Law—Right to Counsel—Indigency—Impairment of Right—Setting Fee.** Imposition of post-proceedings repayment obligations upon an indigent accused's exercise of his right to counsel, without providing an opportunity for him to discuss the fee involved, is arbitrary and violative of due process protections.

[4] **Constitutional Law—Statutes—Constitutional Rights—Impairment of Right.** Legitimate statutory objectives may not, whether merely

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[4] I note that in the intervening period following the convictions in the case at bar, the Superior Court for King County has rendered a declaratory judgment holding that Seattle Code 12.11.220 is inapplicable to similar performances at the New Paris Theater. Taylor v. Seattle, King County Cause No. 761928 (Super. Ct. Mar. 21, 1973), *related appeal pending,* Court of Appeals, Division One, Cause No. 2604-I.

EXCERPTS FROM OPENING BRIEF OF APPELLANTS IN THE WASHINGTON SUPREME COURT

"The sole question presented on this appeal is the applicability of Ordinance 16046, § 21, to theatrical performances, and, if applicable, whether it is then constitutional as so applied."

(App. Br. 3.)

"This appeal presents three legal issues:

". . .

"2. If it is concluded that the ordinance is applicable, then the issue becomes whether the ordinance, as so applied, is constitutional.

(App. Br. 6.)

"*IF ORDINANCE 16046, § 21, IS APPLICABLE TO PERFORMANCES ON A STAGE IN A THEATRE, THEN IT IS, AS SO APPLIED, UNCONSTITUTIONAL.*"

(App. Br. 12.)

". . .

"If applicable to theatrical productions, then Ordinance 16046, § 21, becomes obviously unconstitutional on its face because of overbroadness. That is, it would then purport to prohibit matters which are not obscene in the constitutional sense under decisions of the Supreme Court of the United States. As stated in *Mishkin v. New York*, 383 U.S. 502, 16 L.Ed.2d 56, 86 S. Ct. 958 (1966):

> "'The First Amendment prohibits criminal prosecution for the publication and dissemination of allegedly obscene books that do not satisfy the *Roth* definition of obscenity. States are free to adopt other definitions of obscenity only to the extent that those adopted stay within the bounds set by the constitutional criteria of the *Roth* definition, which restrict the regulation of the publication and sale of books to that traditionally and universally tolerated in our society.'

"As an example, the ordinance prohibits nudity. Nudity is not necessarily obscene in the constitutional sense. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958), reversing, *per curiam* [sic], 249 F.2d 114 (CADC, 1957).

"As stated by the three-judge court in *P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757 (D. Mass., 1970):

> "'Having concluded that the constitution prevents a state from regulating a live theatre production unless it is constitutionally

"obscene," we now ask whether either section 16 or the "closely similar" common law crime of indecent exposure can be applied to the live theatre without offending that constitutional limitation. Since we are dealing with a medium protected by the First Amendment, we keep in mind that "precision of regulation must be the touchstone." *Interestate Circuit v. Dallas*, 390 U.S. at 682, 88 S. Ct. at 1302.

"'The kind of activity obviously within the purview of section 16 is the imposition of lewdness or nudity on an unsuspecting or unwilling person . . . These proscriptions obviously apply to a broad range of lewd conduct. *See generally* 94 A.L.R.2d 1348 (1964) (Indecent Exposure). They have not been and need not be limited to constitutional "obscenity" when the activity is imposed on the unsuspecting public.

"'. . .

"'We conclude that Massachusetts' "lewd and lascivious" proscription cannot be given a constitutionally permissible interpretation of the live theater context while retaining its much broader proscription for non-speech forms of lewd conduct, without running afoul of the constitutional requirement that limitations on speech-related activities must be narrowly drawn so as not to chill legitimate expression. *Zwickler v. Koota*, 389 U.S. 241, 250, 88 S. Ct.

391, 19 L.Ed.2d 444 (1967), and cases cited.'

"Nor would it make any difference if the activity performed by these particular appellants was 'obscene' in the constitutional sense, and, therefore, could be subject to prosecution under a properly drawn ordinance or statute. In *Gooding v. Wilson,* 405 U.S. 518, 31 L.Ed.2d 408, 92 S. Ct. 1103 (1972), the Supreme Court of the United States recently reaffirmed its constitutional doctrine of permitting a statute to be struck down at the instance of a person whose conduct could constitutionally be proscribed by a properly drafted statute. As stated by the court in that case:

> "'It matters not that the conduct appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when no "readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution" *Dombrowski v. Pfister,* 380 U.S. 479, 491 (1967), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statues [sic] with no requirement that the person making the attack demonstrate that his own conduct can [sic] not be regulated by a statute drawn with the requisite narrow specificity.'

"Accord: *Dombroski* [sic] *v. Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S. Ct. 1116 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 12 L.Ed.2d 377, 84 S. Ct. 1316 (1964).

"In *Gooding v. Wilson, supra*, the court pointed out that the First Amendment forbids states from punishing speech not within 'narrowly limited classes of speech,' and that even as to such 'narrowly limited classes' 'the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the projected [sic] freedom.' 'In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible or applicable to protected expression.'

"If Ordinance 16046, § 21, applies to the theatre, it prohibits all nudity, irrespective of whether such nudity is obscene, because it would then be 'susceptible of application to protected expression,' it is unconstitutional."

(App. Br. 16-19.)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE CITY OF SEATTLE, Respondent,	REMITTITUR
v.	No. 42650-51
TERESA NATALE MARSHALL and JAMES LEE VERDON, Appellants.	King County Nos. 59239 & 61745

The State of Washington to: The Superior Court of the State of Washington in and for King County

This is to certify that the opinion of the Supreme Court of the State of Washington filed April 25, 1974, became the final judgment of this court in the above entitled case on June 24, 1974. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Six hundred twenty-four and 07/100 dollars ($624.07) in favor of respondent and against appellants.

The petition for rehearing was denied by order dated June 24, 1974.

cc; Mr. Victor V. Hoff
Honorable John P. Harris
Reporter of Decisions

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 24th day of June, A. D., 1974.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington.

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STATE OF WASHINGTON
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IN THE SUPREME COURT
OF THE
STATE OF WASHINGTON

THE CITY OF SEATTLE,
Respondent,
vs.
TERESA NATALE MARSHALL, et al.,
Appellants.

No. 42650, 42651

Department

O R D E R
DENYING
PETITION FOR REHEARING

The Court having considered the appellants' petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 24th day of June, 1974.

By the Court:

/s/ Frank Hale
Chief Justice

83 Wn.2d 665

SUPREME COURT U. S.
FILED
OCT 21 1974
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-319

TERESA NATALE MARSHALL and
JAMES LEE VERDON,
Petitioners,

v.

THE CITY OF SEATTLE,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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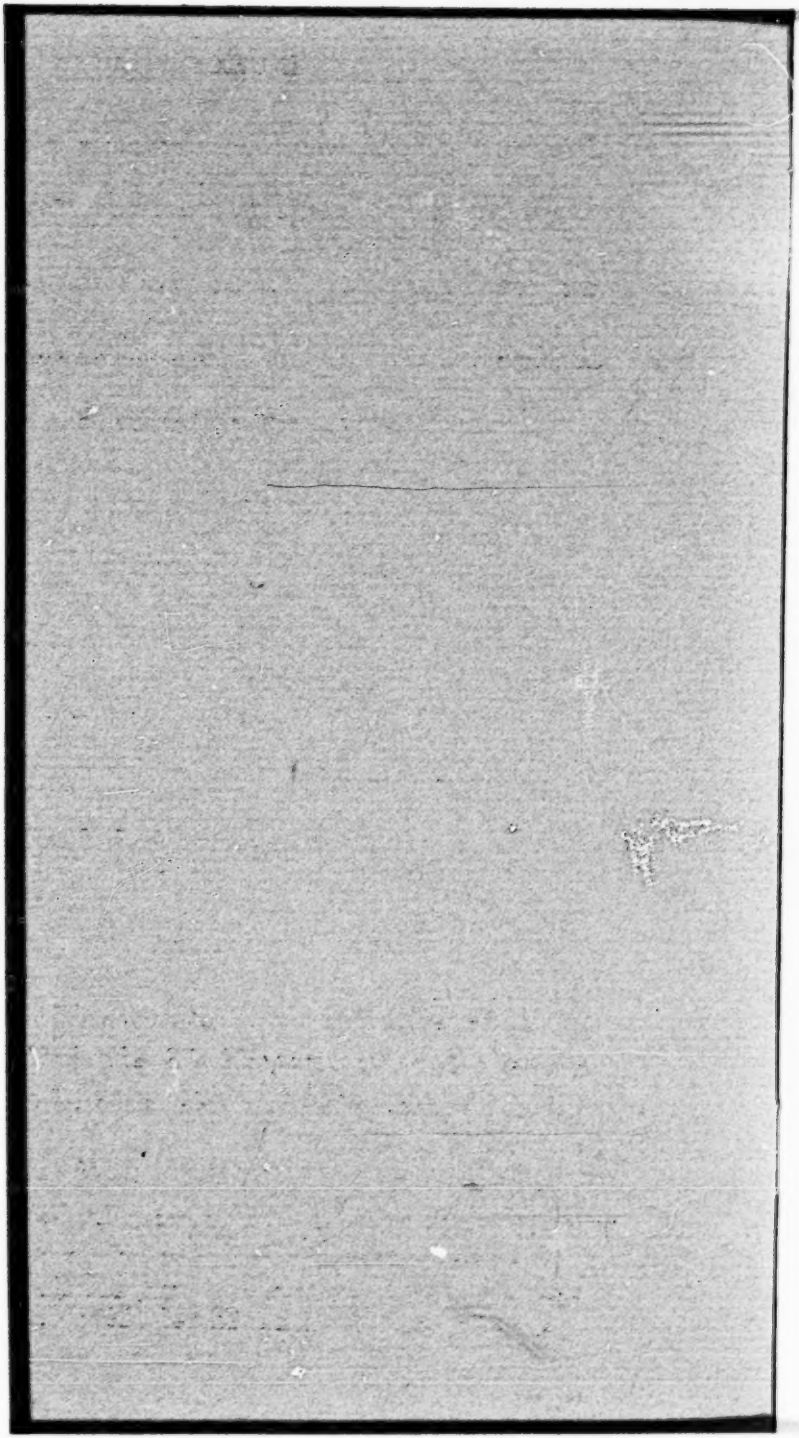

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-319

TERESA NATALE MARSHALL and
JAMES LEE VERDON,
Petitioners,

v.

THE CITY OF SEATTLE,
Respondent.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, The City of Seattle (hereinafter "Seattle") submits this brief in opposition to the petition of Teresa Natale Marshall and James Lee Verdon for a writ of certiorari.

I.

QUESTIONS PRESENTED

The petitioners have presented three questions for review.

1. Is it constitutional under the First and Fourteenth Amendments for a state to apply a criminal

ordinance prohibiting nudity in public to a performance on a stage in a theatre?

2. Does a finding by a state court that a burlesque strip-tease dance is obscene violate the First and Fourteenth Amendments?

3. Does it violate the due process clause of the Fourteenth Amendment for the Supreme Court of Washington to affirm the convictions of petitioners upon the basis of the conclusion by that Court that the subject performances were obscene when petitioners had never been charged with or tried for violating an obscenity law?

COUNTERSTATEMENT OF THE CASE

A.

Additional Facts

This action was commenced on December 7, 1971 at or around 10:40 p.m. when Seattle Police Officer Geiser observed Teresa Natale Marshall on the stage of the New Paris Theatre, 512 Second Avenue in Seattle, Washington. The police officer observed Petitioner Marshall perform a "strip-tease" dance whereby Petitioner removed all her clothing until she was naked. While naked, Petitioner then spread her legs apart exposing her private parts to the audience, then she laid upon her back and simulated a sex act with "bump and grind" motions.

On February 4, 11, and 12, 1972 and March 9, 1972 Seattle Police Officers observed other naked women on the stage of the New Paris Theatre who also undressed until they were naked. While naked they also spread their legs apart and exposed their private parts to the audience of between 30-50 persons. They then simulated sex acts while

on their backs and then on their stomachs on the floor of the stage, or on a large padded stool that was on the stage. They also somersaulted and landed with their legs spread toward the audience and exposed their private parts to the audience while sitting on the edge of the stage two feet from a largely male audience.

On the above dates James L. Verdon was the manager of the New Paris Theatre. He was responsible for hiring all the women performers and counseling them as to when to wear their G-strings, when to appear naked during a performance, and about their actions generally while performing on the stage.

The advertisement outside the New Paris Theatre on the above dates consisted of a sign outside the theatre stating "Girls, Girls, Girls, Topless, Bottomless, Totally Nude" and photographs of girls wearing bikini type bras and panties. The New Paris Theatre admits the general adult public to any of its performances upon payment of a monetary fee.

The Petitioners were convicted in Seattle Municipal Court and appealed to the Superior Court for King County, Washington, for a trial *de novo*. The case was tried to the court without a jury. The Court found Teresa Natale Marshall guilty beyond a reasonable doubt of violating Seattle Ordinance 16046, Section 21, as amended. The Court also found James L. Verdon was guilty beyond a reasonable doubt of violating Seattle Ordinance 16046, Section 21, as amended by 89022, by aiding and abetting said ordinance's violation, in that the actions Petitioner Verdon counseled the women to perform were lewd and obscene conduct and not constitutionally protected speech.

ARGUMENTS

It is submitted that the decision of the Supreme Court of the State of Washington sustaining petitioners' convictions for engaging in lewd and obscene conduct on the stage of an establishment known as the "New Paris Theatre" and for aiding and abetting said act and other repeated violations is entirely correct, *Seattle v. Marshall,* 83 Wn.2d 665, 521 P.2d 693 (1974).

Petitioners were convicted of violating Seattle Ordinance 16046-21 (as amended) which states:

> "It is unlawful for any person to appear in a state of nudity, or in any indecent or lewd dress, or make any indecent exposure of his person, or to expose his private parts to public view, or be guilty of any lewd act or behavior in any place exposed to public view."

Petitioners do not dispute the facts.

Since a theater is a public place, *Paris Adult Theatre I et al. v. Slaton,* 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973) and since petitioner Marshall was nude, exposed her private parts, and simulated a sex act in front of an audience of 30-50 people in a theater, thereby engaging in obscene conduct, she violated Ordinance 16046-21. Petitioners' actions were conduct not protected as speech, *U.S. v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 85 S. Ct. 1673 (1970), and Ordinance 16046-21 applied to them at the time and place alleged in the complaint. Additionally public nudity, and exposure of private parts and publicly simlulating sex acts are obscene per se and meet the tests for obscenity set out in *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Because this conduct was obscene it is not protected by the First Amendment and Ordinance 16046-21 applied to petitioner at the time and place specified in the complaint.

Petitioner Verdon hired the performers, managed them and counseled them to publicly remove their clothes, expose their private parts and simulate sex acts before an audience, and his conduct comes within RCW 9.01.030 which states:

> "Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him."

and Seattle Ordinance 16046-60 which states:

> "The word 'person' wherever used in this chapter, when necessary means and includes natural persons of either sex, associations, copartnerships or corporations, whether acting by themselves or by servant, agent or employee; the singular number shall, when necessary, include the plural and the masculine pronoun include the feminine."

Addressing, generally, petitioners' first two questions presented, the Washington State Supreme Court held in *Seattle v. Marshall, supra,* 671:

> "The arguments of the defendants that their performances are protected by First Amendment rights need not be considered if it is determined that they were obscene. Obscenity is not protected by the First Amendment. *Roth v. United States,* [354 U.S. 476, 77

S. Ct. 1304, 1 L. Ed. 2d 1499 (1957)], and reaffirmed in *Miller v. California, supra. See also State v. J-R Distributors, Inc.*, [82 Wn.2d 584, 512 P.2d 1049 (1973)].

> "The defendants argue extensively, however, that a theatrical performance is protected by the First Amendment as it is in verbal communication. This may be true in the context of a performance communicating a purpose, philosophy or idea (as long as it is not obscene), but there is no possible analogy of a theatrical performance to the conduct that occurred on the stage of the New Paris Theater that was devoid of any plot, and had no purpose whatsoever than to appeal to a sex-oriented prurient interest of an adult male audience."

In regard, specifically, to Petitioners' first question presented, they have failed to state a proper ground for review by this court since the state court judgment is based on a non-federal ground of ordinance construction. This Court has consistently held that it will ordinarily accept the construction given state statutes or ordinances in local courts. *Baggett v. Bullitt*, 377 U.S. 360, 12 L. Ed. 2d 377, 84 S. Ct. 1316 (1964); *A.F.L. v. Watson*, 327 U.S. 582, 90 L. Ed. 873, 66 S. Ct. 761 (1945). Where a state law is admitted to be valid and the only question is whether it has been correctly construed, this court has no jurisdiction. *Commercial Bank v. Buckingham*, 46 U.S. 317, 5 How 317, 12 L. Ed. 169 (1847); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 28 L. Ed. 822, 91 S. Ct. 1400 (1971). Since obscenity does not fall within the protection of the First Amendment, the overbreath doctrine is not applicable. *Plummer v. Columbus*, 414 U.S. 2, 38 L. Ed. 2d 3, 94 S. Ct. 17 (1973) (Justice Powell dissent).

Although the petitioners' second question presented may present a substantive federal question, that issue was de-

termined by the Washington State Supreme Court in accordance with applicable decisions of the United States Supreme Court.

In *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342, rehearing denied (1973), a case involving the power of the California Liquor authorities to revoke liquor licenses in those places that provided among other things live entertainment featuring "gross sexuality," this Court stated:

> "But as the mode of expression moves from the printed page to the commission of public acts which may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression which is directed to the accomplishment of an end which the State has declared to be illegal when such expression consists in part of 'conduct' or 'action.' *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). In *O'Brien, supra*, the Court suggested that the extent to which 'conduct' was protected by the First Amendment depended on the presence of a 'communicative element,' and stated:
>
> > 'We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. 391 U.S., at 376.'
>
> "The substance of the regulations struck down prohibit licensed bars or nightclubs from displaying, either in the form of movies or live entertainment 'performances' which partake more of gross sexuality than of communication."

This Supreme Court has also recently decided four other cases with applicability to this issue. *Miller v. California, supra; Paris Adult Theater I, et al. v. Slaton, supra; U.S. v. Orito*, 413 U.S. 139, 93 S. Ct. 2674, 37 L. Ed. 2d 513 (1973); *U.S. v. 12, 200-ft. Reels of Super 8 mm Film*

et al., 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973). In the above cases, this Court was careful to emphasize the greater power of the States to regulate live performances.

In *Miller, supra*, 413 U.S. at 25-26, this Court observed:

> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places."

And this Court continues its explanation of this statement in footnote 8:

> "Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be 'sufficiently justified if . . . it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"

Therein it was also noted:

> ". . . to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press . . .' *Breard v. Alexandria*, 341 US, at 645, 95 L Ed 1233, 35 ALR2d 335. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of

> the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people,' *Roth v. United States, supra,* at 484, 1 L Ed 2d 1498 (emphasis added). See *Kola v. Wisconsin,* 408 US, at 230-232, 33 L Ed 2d 312; *Thornhill v. Alabama,* 310 US, at 101-102, 83 L Ed 1093. But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter."

In *Paris Adult Theater I, supra,* 413 U.S. at 67, this Court stated:

> "Conduct or depictions of conduct that the state police power can prohibit on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theatre stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

As the above citations of authority illustrate, conduct that can be validly prohibited on a public street does not become automatically protected merely because it is done on a live theater stage.

As the Washington State Supreme Court observed:

> "That the performance in the New Paris Theater was obscene is further supported by the case of *Adams Theatre Co. v. Keenan,* 12 N.J. 267, 275, 96 A.2d 519, 523 (1953), wherein Justice Brennan described a class of burlesque to be *obscene,* which clearly encompasses the facts of the instant case:
>
> " 'In contrast, that which has been termed "modern burlesque" has been described as
>
> " ' " *a plotless musical entertainment consisting of a series of unrelated episodes and dances, all with the purpose of depicting or suggesting sexual subjects or objects.* The one outstanding charteristic of mod-

> ern burlesque is the fact that it is completely sex-centered. It has some low comedy and occasionally some humor but the principal subject of both is sex. ° ° ° the *piece de resistance* is the girl who disrobes, partially or entirely, and this act varies with the political season and the locality. ° ° ° If burlesque of today is metropolitan, so also it is vice, and needs to be thought of in that light, as an aspect of social pathology. If vice implies a sense of antagonism toward existing mores, a purveying of sex in a vicarious, professional and promiscuous fashion, then burlesque is just that. ° ° ° Although the operator may not be willing to say so to an inquirer, usually adopting a sanctimonious air, he knows, and everything in his theatre indicates he knows, that he is giving a sex show, sans excuses, sans philosophy and above all, sans clothes. He is, in that sense a professional purveyor of sex.' *Dressler, Burlesque as a Cultural Phenomenon* (1937).
>
> *"A burlesque show answering the latter description may well be considered outrightly lewd and indecent.* (Italics ours.)"

In answer to the petitioners' third question presented, they have again failed to state a proper grounds for review, since the state court judgment is based on a non-federal ground of ordinance construction. Construction of an ordinance by a state court is a ruling on a question of state law that is binding on this court as though the precise words had been written into the ordinance. *Terminiello v. Chicago,* 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1948). The state court in its decision has construed lewd to mean obscene. 83 Wn.2d 665 at 672, 521 P.2d 693 at 697 (1974). This court therefore should adopt such reasonable interpretation of the ordinance as removes it farthest from possible constitutional infirmity *Kovacs v. Cooper,* 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949).

CONCLUSION

The questions presented in Petitioners' brief involve either a construction of local legislation which is beyond the jurisdiction of this court to construe or an issue which has already been determined by the State Supreme Court in accordance with applicable decisions of this Court. This petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1974

NO. 74-319

TERESA NATALE MARSHALL and
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v.

CITY OF SEATTLE, Respondent.

REPLY BRIEF OF PETITIONERS

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TERESA NATALE MARSHALL and
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v.

CITY OF SEATTLE, Respondent.

REPLY BRIEF OF PETITIONERS

I.

Respondent contends that petitioners' first question presented, to-wit:

> "1. Is it constitutional under the First and Fourteenth Amendments for a state to apply a criminal ordinance prohibiting nudity in public to a performance on a stage in a theatre?"

is not reviewable by this Court because "the state court judgment is based on a non-federal ground of ordinance construction" (Resp. Br. 6).

Petitioners do not contend that this Court has jurisdiction to review the construction of the ordinance given by the Court below. This Court will accept the construction of state law given by the Court below, but that is no answer to the question presented, which is a federal constitutional question of whether that law, as so construed, is violative of the First and Fourteenth Amendments. See, *e.g., Baggett v. Bullitt*, 377 U.S. 360 (1964).

Only if the decision of the Court below rests upon an adequate state law basis, independent of the federal constitutional question, will this Court deny review of the federal constitutional question. See *United Airlines v. Mahin*, 410 U.S. 632 (1973); *Beecher v. Alabama*, 389 U.S. 35 (1967).

Respondent also cites the rule that if a state law is admitted to be valid and the only question is whether it has been constitutionally construed this Court lacks jurisdiction to review (Resp. Br. 6). This rule is inapplicable. Petitioners do not admit that the ordinance, *as construed and applied by the court below*, is valid. The law could have been construed to be valid by limiting

its applicability so as not to apply to performances on the stage in a theatre. The Court below rejected that potential construction.

Nor is the only question whether the ordinance has been correctly construed. That is not a question for this Court. The question is whether, as construed, the ordinance is constitutional; or, if the opinion of the Court below construed the ordinance as an obscenity ordinance, whether the performances could constitutionally be considered as obscene, and whether petitioners were denied due process because they were not tried for obscenity.

II.

Respondent contends that petitioners' second question presented, to-wit:

> "2. Does a finding by a state court that a burlesque strip-tease dance is obscene violate the First and Fourteenth Amendments?"

while presenting a substantive federal question, is a question which was decided by the Court below in accordance with applicable decisions of this Court (Resp. Br. 7-9). Respondent cites and relies on this Court's comments in *California v. LaRue*, 409 U.S. 109 (1973);

conclusion by that Court that the subject performances were obscene when petitioners had never been charged with or tried for violating an obscenity law?"

fails to state a proper ground for review by this Court, because it is based on ordinance construction, which is not a federal constitutional question.

This argument is specious. Petitioners' third contention is that they were denied due process by the application of this new construction of the ordinance to affirm the convictions when petitioners were not charged with nor tried for violating an obscenity law. The Court below equated "lewd" with "obscene." Petitioners were not even charged under the "lewd" provision of the ordinance but were charged with exposing private parts to public view.

IV.

This Court has granted certiorari in No. 73-1004, *Southeastern Promotions, Ltd. v. Conrad*, ___ U.S. ___, 39 L. Ed. 2d 466 (1974). That case apparently involves, *inter alia*, the obscenity vel non of the theatrical production "Hair," and certainly involves nudity on the stage in a theatre.

The decision in that case may answer some of the open questions regarding

live nudity in the theatre. The difference in the type of theatre involved (a nationally acclaimed and successful musicial v. burlesque) makes it very appropriate to consider this case as a companion to that case.

Petitioners respectfully submit review should be granted.

Respectfully submitted,

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